IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE A.K.BASHEER

TUESDAY, THE 12TH DECEMBER 2006 / 21ST AGRAHAYANA 1928

WP(C).No. 14522 of 2006(D)

PETITIONERS:

1. **VINU.C.R,**
   PD TEACHER, G.V.H.S.S. VENGARA,
   VENGARA, MALAPPURAM DISTRICT.

2. **SANTHOSH KUMAR.K,**
   PD TEACHER,
   GOVERNMENT GIRLS HIGH SCHOOL,
   CHALA, THIRUVANANTHAPURAM.

BY ADV. SRI.M.SASINDRAN
SRI.TOJAN J. VATHIKULAM

RESPONDENTS:

1. **THE DIRECTOR OF HIGHER SECONDARY**
   EDUCATION,
   THIRUVANANTHAPURAM.

2. **STATE OF KERALA,**
   REP. BY THE SECRETARY TO GOVERNMENT,
   DEPARTMENT OF HIGHER SECONDARY EDUCATION,
   SECRETARIAT, THIRUVANANTHAPURAM.

"3. BHASKARAN P.V., G.H.S.S., PEELICODE,
KASARAGOD.

4. KARTHRIKUTTY AUGUSTINE, G.H.S.S., KOTTAYI,
KOTTAYI P.O., PALAKKAD."

BY GOVERNMENT PLEADER SMT.M.R.SREELATHA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 11/10/2006, ALONG WITH WPC NO. 15162 OF 2006 WPC NO. 24369 OF 2006 WPC NO. 24675 OF 2006 THE COURT ON 12/12/2006 DELIVERED THE FOLLOWING:

W.P.(C) NO.14522/2006

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE SENIORITY LIST OF PRIMARY TEACHERS WHO ARE ELIGIBLE TO BE APPOINTED AS H.S.S.T.

EXT.P2:- COPY OF THE LIST OF H.S.A.S PUBLISHED BY THE 1ST RESPONDENT, DECLARING ELIGIBLE TO BE APPOINTED AS H.S.S.T.(COMPUTER SCIENCE).

EXT.P3:- COPY OF THE NOTIFICATION PUBLISHED BY THE PUBLIC SERVICE COMMISSION CALLING FOR APPOINTMENT TO THE POST OF H.S.S.T (COMPUTER SCIENCE).

EXT.P4:- COPY OF THE ORDER NO.AD B2/8722/05/HSE DT.15.6.06.

EXT.P4(A):- COPY OF THE ANNEXURE I LIST APPENDED TO THE ORDER.

EXT.P4(b):- COPY OF THE ANNEXURE II LIST APPENDED TO THE ORDER.

/TRUE COPY/

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A.K. Basheer, J.

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W.P(C) Nos. 14522/2006-D,
15162/2006-E, 24369/2006-A
& 24675/2006-K

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Dated this the 12h day of December, 2006.

J U D G M E N T

An interesting question with wide ramifications in the matter of "appointment by transfer" of Higher Secondary School Teachers from the categories of High School Assistants and Upper Primary School Assistants/Lower Primary School Assistants in Government service, has come up for consideration in this bunch of writ petitions.

2. While petitioners in W.P.No.14522/06 and 15162/06 are Primary Departmental Teachers now working in various Government schools, petitioners in W.P.24675/06 are working as HSAs. Petitioners in WP.24369/06 are stated to be qualified candidates eligible for appointment as Higher Secondary School Teachers in Computer Science/Computer Application under the direct recruitment quota. The petitioners in all these writ petitions are aspirants to the post of HSST and HSST (Junior) in Computer Science/Computer Application.

3. Briefly put, the question is whether UPSAs/LPSAs who possess the prescribed qualification to be appointed as HSST and HSST (Junior) in Computer Science/Computer Application can be overlooked or ignored and HSAs with lesser or "alternate" qualifications can be preferred, while making "by transfer appointment" under the 25% quota earmarked for departmental candidates.

4. On June 30, 2005, the Director of Higher Secondary

Education issued a notification inviting applications from qualified departmental teachers from the categories of High School Assistants, Upper Primary School Assistants and Lower Primary Schools in Government service for State-wise "by transfer appointment" of Higher Secondary School Teachers and HSST (Junior) in various subjects. It was proposed to prepare a seniority list of qualified persons with requisite qualifications on the basis of the Special Rules for the Kerala Higher Secondary Education (State and Subordiante Services) Rules 2001 (for short, the Rules) . The subject for which selection was proposed to be made, qualifications prescribed for the post etc. were specified in the notification. A true photocopy of the above notification has been produced as Ext.P2 in WP.15162/06.

5. According to the Upper Primary School Assistants (petitioners in WP14522/06 and 15162/06) , they are qualified to be appointed as HSST in Computer Science/Computer Application. They are Post Graduates in Information Technology (M.Sc), Computer Application (MCA), Computer Science etc. though one of them possesses P.G.Diploma in Computer Application.

6. The grievance of these Primary Departmental Teachers is that H.S.As with lesser qualifications like Post Graduate Diploma in Computer Application, Bachelor's Degree in Computer Science etc. are being preferred to them though they possess higher qualifications like Master's Degree in the subject concerned.

7. Since the issue involved in these cases relates to appointment to the post of HSST (Computer Science) , it will be profitable to refer to the relevant qualifications in the Special Rules .

“37.Computer Science.	By transfer and by direct recruitment	(1) Master's Degree in Engineering or Technology in the concerned subject/ M.Tech degree in Computer Science Computer Engineering or Information Technology/ Software Engineering with not less than 50% marks from a recognised University OR Master's Degree in Computer Application/ Master's Degree in Computer Science or Information Technology with not less than 50% marks from a recognised University. 2. In the absence of qualified candidates in item (1) above, B.Tech / Bachelor of Engineering Degree with not less than 50% marks in any branch of study with Computer Science/ Computer Engineering/ Information Technology from a recognised University. OR B.Tech/ Bachelor of Engineering Degree with not less than 50% marks in any branch of study with post Graduate Diploma in Computer Application from a recognised University or Lal Bahadur Sastri Centre for Science and Technology / Institute of Human Resources
38.Computer Application.		

Development or Department of Electronics “A” level accredited

OR

Master's Degree with not less than 50% marks in Mathematics/Physics with post Graduate Diploma in Computer Application from a recognised University/ Institute of Human Resources Development/ Lal Bahadur Sastri Centre for Science and Tecnology or Department of Electronics “A:” level accredited

OR

M. Tech degree with not less than 50% marks in Electronics and Telecommunication/ Electronics Engineering from a recognised University.

OR

B.Sc Degree in Computer Science with not less than 50% marks and Post Graduate Diploma in Computer Application from a recognised University or Lal Bahadur Sastri Centre for Science and Technology / Institute of Human Resources Development for Department of Electronics “A” level accredited.

OR

M.Sc Statistics with not less than 50% marks with Post Graduate Diploma in Computer Application from a recognised University.

In the case of appointment of HSST (Junior) in Computer Science also, the prescribed qualifications are the same.

8. It is contended by the Primary Departmental Teachers that except serial nos.1 and 3 in Ext.P3 provisional seniority list of HSAs, all other candidates in the said list are only Post Graduates either in Mathematics or Physics with P.G.Diploma in Computer Application. In other words, the contention is that all the HSAs who have been included in the seniority list except the two mentioned above, have a lesser qualification to their credit. They do not possess Master's degree in Engineering or Technology in Computer Science/Computer Application or M.Tech degree in Computer Science, Computer Application or Information Technology. They also do not possess Master's degree in Computer Application or in Computer Science. They are being preferred only because they are HSAs though they possess only P.G.Diploma in Computer Application, in addition to the Master's degree in Mathematics/Physics . On the contrary, petitioners have got Master's degree in the subject concerned as prescribed in the Special Rules. But still they are not being appointed as HSSTs.

9. However it is contended on behalf of the HSAs/petitioners in WP. 24675/06 that Ext.P2 seniority list of HSAs has been prepared in conformity with the provisions contained in the Special Rules. The said seniority list had become final. Therefore the available 21

vacancies of HSSTs (Computer Science/Computer Application) as well as 3 vacancies of HSST (junior) in Computer Science have to be filled up from the above final list (Ext.P2). The thrust of the argument of the learned senior counsel appearing for the HSAs is that qualified HSAs have to be preferred under the 25% quota for "by transfer appointment". If HSAs with prescribed qualifications are available, they have to be necessarily appointed. It is further contended by the learned senior counsel that the Rules do not prescribe any alternate qualifications as contended by the Primary Departmental Teachers. So long as a High School Assistant with any of the prescribed qualifications is available and if he is included in the select list on his being found to be eligible for appointment by transfer, such a candidate cannot be denied appointment, it is contended.

10. In the counter affidavit filed on behalf of the Director of Higher Secondary Education, it is averred that "25% of the qualified HSAs are to be considered in accordance with their qualifications and only in the absence of such qualified HSAs, UPSA/LPSA need be considered ." It is further averred that no alternate qualifications have been contemplated or envisaged under the Special Rules as contended by the P.D. teachers. It is also contended by respondent No.1 that the claim of the P.D. teachers "to get preference over those HSAs with regard to the appointment to the post of HSSTs can be viewed only as a mis-interpretation of Special Rules which are formulated for the appointment of HSST.". Respondent No.1 has further asserted that separate seniority list of HSAs and P.D. teachers had been prepared to

ensure that "equals are pooled together." To sum it up, respondent No.1 contended that UPSA/LPSA "can be considered for appointment by transfer only in the absence of qualified HSAs".

11. Appointment of Principal and Higher Secondary School Teacher in the Government Higher Secondary Schools is governed by the Kerala Higher Secondary Education State Service Rules 2001. Other categories like HSST (Junior), Librarian Grade III, Librarian Grade IV and Laboratory Assistant are governed by the Kerala Higher Secondary Education Subordiante Service Rules 2001. The above two sets of Rules were notified on April 16, 2001 in G.O (P). 144/2001/G.Edn.

12. Rule 3 of the State Service Rules referred to above, deals with the method of appointment to the category of HSST. Appointment is by transfer from HSST (Junior) in the subject concerned, and in the absence of qualified hands under that category, the vacancies have to be apportioned in the ratio of 1:3 between appointment by transfer from among HSAs and UPSAs/LPSAs and through direct recruitment.

Rule 3 of the above Rules is extracted below.

"3. Appointment:- Appointment to the categories shall be made as follows:

Category	Method of appointment
1. Principal	1. By promotion from category 2; and 2. By transfer from qualified Headmasters of High Schools in the Kerala General Education Services.

Note: The posts shall be filled up by the methods specified in item (1) and (2) above in the ratio 2: 1. If qualified candidates are not available for appointment to a vacancy by any one of the methods specified above such vacancies shall be filled up by the other method.

2.Higher Secondary School Teacher	1. (i) By transfer from Higher Secondary School Teacher (Junior) in the Subject concerned; (ii) In the absence of qualified hands under clause (i) above the vacancies shall be apportioned in the ratio of 1: 3 between appointment by transfer and direct recruitment as detailed below:- 1)a. By transfer from High School Assistants included in the General Education Subordinate Service who possess the requisite qualification in the subject concerned. b. In the absence of qualified persons under item (a) above, by transfer from qualified Upper Primary School Assistants/Lower Primary School Assistants included in the General Education Subordinate Service who possess the requisite qualification in the subject concerned.

2). By direct recruitment.

Notes: 1. When qualified persons are not available to fill up the vacancies set apart for appointment by transfer under item 11(1), such vacancies shall also be alloted for direct recruitment.

2. Appointments under item (1) above shall be made from select lists of qualified persons prepared on the basis of merit and ability.

3. Direct recruitment under item 11(2) shall be made on statewise basis by the Kerala Public Service Commission"

13. A perusal of the above Rule shows that appointment to the category of HSST has to be made by transfer from among qualified HSSTs (Junior) in the subject concerned. Clause (ii) provides that in the absence of qualified hands among HSST (Junior), the vacancies shall be apportioned in the ratio of 1: 3 between appointment by transfer and direct recruitment. Appointment by transfer has to be effected from among HSAs with requisite qualification in the subject concerned. If qualified HSAs are not available appointment by transfer has to be effected from among qualified UPSAs/LPSAs included in the General Education Subordiate service, if they possess requisite qualification in the subject concerned. While providing that 25% of the total posts are to be filled up by appointment by transfer and 75% through direct recruitment, the rule making authority did not fix any internal ratio between HSAs on one hand and UPSAs/LPSAs on the other. The entire confusion could have been avoided if only the rule making authority did bestow its attention on this aspect. But, for some inexplicable reasons, the rule making authority did not deem it

necessary to fix a ratio between HSAs and UPSAs/LPSAs.

14. As noticed already, Rule 3 does not contemplate or provide for an internal ratio between HSAs and P.D.teachers in the 25% quota earmarked for the said two categories. It is true that HSAs have got teaching experience at a "higher level" , in the sense that they are teaching students in the secondary school level whereas, P.D.teachers do take classes for L.P. and U.P.School students. The qualifications prescribed for the two categories of teachers are also different if we go by the Rules. It may be true that many of the P.D.teachers may have equal or higher qualifications than some of the HSAs. and quite a few of them may even have better qualifications than some of the HSSTs.

15. As mentioned above, 25% of the quota earmarked for departmental candidates has to be filled up from among eligible candidates belonging to the category of HSAs and UPSAs/LPSAs with requisite qualifications. For this purpose, the Directorate of Higher Secondary Education prepares seniority list from among the eligible candidates on the basis of seniority, qualification etc. It is on record that separate lists of HSAs and UPSAs/LPSAs have been prepared for this purpose.

16. Did the Rule making authority envisage a common seniority list of HSAs and UPSAs/LPSAs? There is no clue. Anyhow in the case on hand such a common seniority list of HSAs and UPSAs/LPSAs has not been prepared. Respondent No.1 has contended that separate seniority lists of HSAs/UPSAs/LPSAs had been prepared to avoid unequals being "pooled together". Solution to

this imbroglio or dilemma may be possible only if some selection process is prescribed for the departmental candidates also , to fill up the vacancies available under the 25% quota as in the case of the direct recruits (75%) being held by the Public Service Commission. But since such a process has not been contemplated under the Rules, the question posed above still looms large.

17. A perusal of the qualifications prescribed under Rule 5 of the Special Rules undoubtedly shows that the qualifications incorporated therein are alternative. If no Post Graduate in the subject concerned is available, a B.Tech graduate or Bachelor of Engineering in the subject can be considered. Similarly it is also provided that a Post Graduate in Statistics with P.G.Diploma in Computer Application can become eligible for appointment in the absence of a Master's Degree holder in Engineering or Technology in Computer Science. Significantly a Master's Degree holder in Mathematics/Physics with P.G.Diploma in Computer Application will also be eligible for appointment in the absence of candidates with Master's degree in Computer Science or Computer Application. Undoubtedly the qualifications are alternative. But the contention of the High School Assistants is that an HSA with any one of the qualifications prescribed in Rule 5 would come within the zone of consideration irrespective of the fact that he has not obtained Master's degree in the subject concerned. If the above proposition is accepted, the result would be that UPSAs/LPSAs may not be able to get appointment by transfer under the 25% quota, particularly in Computer Science/Computer Application for which several alternate qualifications have been prescribed in the Rules.

18. The heart burn of UPSAs/LPSAs who possess requisite qualifications to hold the post of HSST or HSST (Junior) in Computer Science and Computer Application will have to be appreciated in the above facts and circumstances. The quota earmarked for the departmental candidates has to be distributed proportionately and equitably. This exercise has to be necessarily done by the Government/Department. There is considerable force in the contention raised by the UPSAs/LPSAs that while making "by transfer appointment" it should be ensured that qualified UPSAs/LPSAs in Computer Science are not ignored solely for the reason that no ratio has been fixed in the relevant rules. It may be true that HSAs with their teaching experience at a higher level as compared to primary teachers, can claim an edge over the latter. But so long as 25% quota has been set apart for departmental candidates like HSAs and UPSAs/LPSAs, the Rule making authority ought to have fixed an internal ratio between the two categories. It may yet again be true that Rule 3 of the Rules indicates that UPSAs/LPSAs would become eligible for "by transfer appointment" only if qualified HSAs with requisite qualification in the subject concerned are not available.

19. Curiously the Department has taken an equivocal stand in the matter, though ultimately it is contended by them that UPSAs/LPSAs would be entitled to get appointment only if qualified HSAs are not available. So long as Rule 3 of the Special Rules provides for a channel of appointment to qualified UPSAs/LPSAs under the 25% quota, such right available to those teachers will have to be protected. Otherwise the equality clause under the Constitution

will be undoubtedly violated.

20. As held by their Lordships of the Supreme Court in **Kailash Chand Sharma v. State of Rajasthan** (AIR 2002 SC 2877), the policy decision of the State "should be free from the vice of arbitrariness and conform to the well settled norms both positive and negative underlying Arts. 14 and 16, which together with Art.15 form part of the constitutional Code of equality." Their Lordships further laid down that "If the policy decision has the effect of deviating from the normal and salutary rule of selection based on merit and if it is subversive of the doctrine of equality, it cannot sustain. Even the policy decision taken by the State Government has to pass the test of Arts.14 and 16 of the Constitution, their Lordships went on to add.

21. Undoubtedly there is force in the contention raised by the UPSAs/LPSAs that alternate qualifications prescribed for the HSST, (Computer Science and Computer Application) under Rule 5 would mean that UPSAs/LPSAs with requisite qualification in the subject will never get a chance for appointment, because there will be large number of HSAs with one or the other alternate qualification in the subject. This in effect will mean that the 25% quota fixed for the departmental candidates will be confined only to HSAs. Resultantly, the quota rule will become otiose and illusory. Viewed from that angle, the contentions raised by the P.D. teachers cannot be brushed aside lightly. But so long as the qualifications prescribed under Rule 5 enable the HSAs to get appointment by transfer in terms of the existing rules, necessarily their rights have to be protected.

22. But the issue is clinched in favour of HSAs since Rule 3 of the Special Rules relating to appointment of HSST clearly shows that in the matter of appointment by transfer, the first preference has to go to HSST (Junior) in the subject concerned. In the absence of any qualified HSST (Jr.), the vacancies will have to be apportioned in the ratio of 1 : 3 between HSAs and UPSAs/LPSAs. UPSAs/LPSAs will become eligible for consideration only if HSAs with requisite qualification in the subject concerned are not available. Thus it is clear that the Rule making authority intended to give the benefit of by transfer appointment to UPSAs/LPSAs only in the absence of HSST (Jr.) and HSAs with requisite qualifications in the subject concerned. So long as no internal ratio between HSAs and UPSAs/LPSAs has been fixed, it cannot be said that teachers belonging to the latter category should be given appointment if HSAs with any of the qualifications prescribed in the subject concerned are available. It must be remembered that HSAs fall in a category above that of UPSAs/LPSAs.

23. Having regard to the totality of circumstances I am not satisfied that the claim made by the P.D teachers is liable to be allowed. Therefore W.Ps.14552/06 and 15162/06 are dismissed. W.P.No.24675/06 and 24369/06 are disposed of with a direction to the Department to complete the process of appointment by transfer and direct recruitment in accordance with the Rules adhering to the quota fixed for departmental candidates and direct recruits. The Rule making authority shall address the issue raised by the P.D.teachers and avoid their heart burn by fixing an internal ratio under the 25% quota

between HSAs and UPSAs/LPSAs, if feasible.

an. **A.K. Basheer**

Judge.